# Petition

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No.

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In the Supreme Court of the United States
OCTOBER TERM, 1981

ANTHONY PAUL RUSSO, Petitioner

v.

STATE OF CALIFORNIA

# PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT

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## QUESTION PRESENTED

Whether the warrentless unreasonable invasion by a D.E.A. agent of a sender's constitutionally protected interest in the privacy of a fully wrapped and sealed package, consigned to a common carrier violates the rules of Walter v. United States, 447 U.S. 649 (1980), Arkansas v. Sanders, 442 U.S. 753 (1979), United States v. Chadwick, 433 U.S. 1 (1977) and Katz v. United States, 389 U.S. 347 (1967).

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PETITION FOR A WRIT OF CERTIORARI TO
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The petitioner ANTHONY PAUL RUSSO respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeal of California, First Appellate District, filed February 19, 1981.

## OPINION BELOW

The opinion of the District Court of Appeal for the State of California is included in the Appendix to the petition.

## JURISDICTION

The District Court of Appeal opinion was filed on February 19, 1981. Hearing was

sought in the California Supreme Court and was denied on May 18, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1257.

## QUESTION PRESENTED

Whether the warrantless unreasonable invasion by a D.E.A. agent of a sender's constitutionally protected interest in the privacy of a fully wrapped and sealed package, consigned to a common carrier violates the rules of Walter v. United States, 447 U.S. 649 (1980), Arkansas v. Sanders, 442 U.S. 753 (1979), United States v. Chadwick, 433 U.S. 1 (1977) and Katz v. United States, 389 U.S. 347 (1967).

## CONSTITUTIONAL PROVISION INVOLVED

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Fourth Amendment to the Constitution of the United States.

## STATEMENT OF THE CASE

Petitioner RUSSO was convicted on his plea of nolo contendere to a felony charge of having violated California Health & Safety Code §11379 (importation of a controlled substance, methylenedioxy amphetamine, "MDA"). Prior to his conviction, Russo's motion to suppress pursuant to California Penal Code §1538.5 was denied.

Pursuant to California procedure allowing review of search and seizure claims on appeal from a plea of guilty, Russo appealed.

The judgment of conviction was affirmed by a California three judge District Court of Appeal panel, one justice dissenting. The California Supreme Court, denied a hearing on May 18, 1981, one justice dissenting.

In June of 1978, a person identified as "P. Johnson" (who is not alleged to be Russo) left a package with the United Parcel Service, a common carrier, in Atlanta, Georgia, for delivery to a location in Illinois. (This package is referred to as "package one".) A U.P.S. "Loss Prevention Supervisor", James Wilburne, acting

within the scope of his duty, slit the package open to insert a routing slip and noticed that the contents did not appear to be gloves as indicated on the shipping documents. In order to prevent a fraudulent loss claim, Wilburne opened the package and discovered a plastic bag enclosing a brown powdery substance which he suspected might be a narcotic drug. He reported this to his supervisor who then had Wilburne call the local office of the United States Drug Enforcement Administration (DEA). Wilburne spoke to DEA Agent Tyrone Yarn. Yarn told Wilburne to hold the package for him and that he would come and inspect it. Wilburne then re-inserted the bag into the package, closed it, re-wrapped it, and put it into the U.P.S. "evidence locker" (a term used by the U.P.S. employee) where it remained for two days. Wilburne learned from other U.P.S. personnel that "Johnson" had seemed nervous and he alerted the shipping clerks to be watchful for Johnson and similar packages.

On June 30, 1978, two days after package one had been left with U.P.S., "P. Johnson" left with U.P.S. another package

which was, as package one had been, the size and shape of a shoe box, covered with plain brown paper, and sealed with plastic tape. The second package was addressed to petitioner Russo at his home in Palo Alto, California. (This package is referred to as the "Russo package".)

A shipping clerk recognized Johnson and followed him to his car to obtain a license number. Wilburne opened the Russo package and found a plastic bag containing a brown powdery substance. He telephoned DEA Agent Yarn with this information and was again instructed by Yarn to hold the package until he arrived. Wilburne then put the bag back into the package, rewrapped and re-sealed the package and put it into the "evidence locker."

Yarn arrived at U.P.S. a few hours later. He and Wilburne removed package one and the Russo package from the evidence locker. Yarn instructed Wilburne to unseal and unwrap both packages, thus exposing the contents to Yarn, who field tested the powder in the packages. Yarn did not have, nor had he sought to obtain, a search warrant.

The packages were later shipped, at the direction of the DEA, via U.P.S. to their respective destinations. In Palo Alto, the federal narcotics agents executed a "controlled delivery" of the Russo package.

Immediately prior to the controlled delivery, the agents obtained a California State Court search warrant for Russo's residence and the package. The affidavit upon which this search warrant was issued was based solely on the information obtained by Yarn during his warrantless search in Atlanta of the Russo package. After delivering the package into Russo's home, agents waited a short time and then entered the premises under the authority of the search warrant. Russo had not opened the package and the execution of the search warrant recovered the MDA in the Russo package.

## REASONS FOR GRANTING THE WRIT

The warrantless unreasonable invasion of the sender's constitutionally protected interest in the privacy of a sealed and wrapped package violates this Court's interpretation of the protections of the Fourth

Amendment as set forth in Walter v. United States, 447 U.S. 649 (1980), Arkansas v. Sanders, 442 U.S. 753 (1979), United States v. Chadwick, 433 U.S. 1 (1977) and Katz v. United States, 389 U.S. 347 (1967). The California Court relies upon federal constitutional principles which are misinterpreted by that court. Cf. Oregon v. Mathiason, 429 U.S. 492, 493 (1977).

The facts present an unreasonable invasion of the sender's constitutionally protected interest in privacy. DEA Agent Yarn's activity "...was a search; there was no warrant; the owner had not consented; and there was no exigent circumstances." Walter v. United States, 447 U.S. 649, 654 (1980).

Petitioner does not raise any challenge to the first opening of the Russo package - the opening by Wilburne who then telephoned Yarn. The focus of this petition is on the second opening of the Russo package when Yarn and Wilburne took the sealed package out of the U.P.S. evidence locker and

opened it.[1/] That opening constituted a search and it required a search warrant.

This Court has clearly stated that in the absence of some recognized exception to the warrant requirement, police officers are required by the Fourth Amendment to obtain a search warrant before opening and searching luggage, packages, or other repositories of personal effects. Arkansas v. Sanders, 442 U.S. 753 (1979). A warrantless opening of such an item is presumptively impermissible. Katz v. United States, 389 U.S. 347 (1967).

None of the exceptions to the warrant requirement are in existence here: 1) There are no exigent circumstances; 2) There is no plain view; 3) There is no consent.

The exigent circumstance exception does not apply because by the time that Agent Yarn arrived at the U.P.S. office, the

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[1] Strictly speaking, it was Wilburne, a private individual, who opened the Russo package on June 30, 1978. However, he did so in the presence of and at the command of Agent Yarn, a fact which permits the conclusion that it was Yarn who really opened it.

Russo package was securely stored in the U.P.S. evidence locker, safely out of the reach of any drug trafficker. Neither Agent Yarn nor U.P.S. entertained any belief that that package and its contents endangered anyone's personal safety.[2/] Finally, the U.P.S. evidence locker assured that the evidence would not be lost or destroyed before a warrant was obtained. United States v. Chadwick, 433 U.S., (1977).

The plain view exception does not apply because when Agent Yarn first observed the Russo package, its contents were not visible: the package was closed, wrapped and sealed. This is not a case where a common carrier opens a package and leaves it open so that when the police arrive they observe the contents in plain view, obviating the necessity for a warrant. Cf. United States v. Rodriguez, 596 F.2d 169, (6th Cir. 1979), United States v. Sherwin, 539 F2d 1 (9th Cir. 1976). Nor is it a

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[2] For example, the package did not emit an odor. In some situtations this has been found to be an "exigent circumstance." See People v. Lanthier, 5 Cal. 3d 751, 488 P.2d 625 (1971).

case where the incriminating nature of the contents of a package is apparent from its appearance. The shoe box size package, tightly wrapped in plain brown paper and sealed signalled nothing other than a legitimate article. Therefore, under the test established by this Court in Coolidge v. New Hampshire, 403 U.S. 433, 464-473 (1971), the plain view exception is inapplicable.

The fact that the Russo package previously had been opened by Wilburne prior to Yarn's arrival does not mean that the contents were, for Fourth Amendment purposes, in plain view when Yarn arrived. In other words, it might be argued that the zone of privacy, already having had been breached by U.P.S., was no longer extant when Yarn arrived and opened the package. This argument was expressly rejected in Walter v. United States, 447 U.S. 649, 655-657 (1980) where this Court held illegal warrantless viewing of motion picture film which was found in a package previously opened by a common carrier. In Walter it was held that the police are not relieved of the obligation to obtain a warrant even though they are fully aware

of the nature of the contents of a package opened by a common carrier:

> "Nor does the fact that the packages and one or more of the boxes had been opened by a private party before they were acquired by the FBI excuse the failure to obtain a search warrant." 447 U.S. at 655.

Finally, the consent exception to the warrant requirement does not apply because the sender[3] did not either expressly or impliedly consent to U.P.S. exposing to the police the contents of the Russo package. In this situation, it is not reasonable to conclude that the relationship between the sender and U.P.S. was such that the sender assumed the risk of disclosure to the police. Cf. United States v. Rodriguez, 596 F.2d, 169 (6th Cir. 1979), Schneckloth v. Bustamonte, 412 U.S. 218 (1973), Stoner v. California, 376 U.S. 483 (1964).

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[3] Petitioner does not admit to having any connection with either package or with Johnson. In California, People v. Kaplan, 6 Cal.3d 150, 491 P.2d 1 (1971) permits petitioner vicariously to raise Johnson's exclusionary rights.

In Corngold v. United States, 367 F.2d 1 (9th Cir. 1966) the Ninth Circuit held that a common carrier's customer implicitly consents to an inspection of the package by the common carrier but does not necessarily thereby also consent to a search by the police. In other words, the customer implicitly waives his expectation of privacy as to the common carrier only, and retains his expectation of privacy as to everyone else, including the police.[4/]

The California District Court of Appeal, below, relied upon People v. McKinnon, 7 Cal.3d 899 103 CR 897, 500 P.2d 1097 (1972) to uphold the search. McKinnon however, expressly relies upon a pre-Chadwick analogy between packages and automobiles which characterizes packages as "movables" under Chambers v. Maroney, 399 U.S. 42 (1970) and which thereby permits the warrantless opening of packages. This package-automobile equation was disclaimed by Chadwick and subsequent California cases:

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[4] There is no suggestion that the measure of the consignor's expectation of privacy is diminished in any way in this case. Cf. Walter v. United States, 447 U.S. 649 at n.12 (1980).

People v. Dalton, 24 Cal.3d 850, 598 P.2d 467 (1979) and People v. Minjares, 24 Cal.3d 410, 591 P.2d 514 (1979). Several California appellate courts have recognized the demise of McKinnon:

> "...that portion of McKinnon holding that a police officer need not obtain a warrant before opening a closed container has indeed been impliedly overruled (see, e.g., People v. Dalton, (1979), 24 Cal.3d 850." People v. Sapper, 101 Cal. App.3d 301, 304 (1980).
>
> "What remains, too, of the decision in People v. McKinnon . . .?
>
> "The McKinnon court sustained the warrantless search on the ground that the cartons were "readily movable," relying on Chambers v. Maroney, (1970) 399 U.S. 42 ..."
>
> "But in Chadwick, supra, the United States Supreme Court said, "Nor does the footlocker's mobility justify dispensing with the added protections of the Warrant Clause" once it had been reduced to the possession of the federal agents ..."
>
> Hopefully, the next time our high court has the occasion to address the question, we and the trial courts will be given clearer guidance.
>
> Bell v. Santa Clara Superior Court, 101 Cal.App.3d 238, 244, (1980) (Emphasis added.)

However, the majority in the court below felt constrained to follow McKinnon because the California Supreme Court has yet to expressly repudiate it. The dissent in this case stated:

> "The majority relies upon People v. McKinnon (1972) 7 Cal.3d for holding that the motion to suppress was properly denied. If McKinnon were still good law, I might be inclined to agree with the majority, but McKinnon has been so undermined by United States v. Chadwick, (1977) 433 U.S. 1; Arkansas v. Sanders, (1979) 442 U.S. 753; People v. Minjares, (1979) 24 Cal.3d 410; and People v. Dalton, (1979) 24 Cal.3d 850 as to no longer be authoratative. If there has been doubt about that proposition, it was resolved, in my view, by Walter v. United States and Sanders v. United States, (1980) __U.S.__, 100 S.Ct. 2395."
>
> [The full text of the majority and dissenting opinions appear in the Appendix to this petition]

The dissent in the proceedings for interlocutory relief expressed the same view and the majority of that panel implicitly stated that, for better or for worse,

McKinnon controlled unless and until repudiated.

We do not request that this Court adopt any new position or that it once again delve into the seemingly endless complications[5] of defining which items are, or are not, "luggage" or "packages" for purposes of the Fourth Amendment as explained in Chadwick. Instead, the petition requests that this Court continue to apply the principles set forth in Katz, Chadwick, Sanders, and Walter, all of which have been succinctly stated by district court Judge Higgenbotham:

> "...if the contents of a sealed package or parcel are not revealed by the package and you have exclusive control with no fear of harm from its contents --obtain a warrant."
>
> United States v. Rivera, 486 F.Supp. 1025, 1034 (N.D. Tex. 1980).

The record below presents a situation where it is perfectly obvious that the

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[5] See Footnote Three of Judge Tamm's dissent in United States v. Ross, __ F.2d__, No. 79-1624 (D.C. Cir. 3/31/81) at pp. 6-10.

agent's reason for viewing the contents of the box and field testing the powder contained therein was to determine whether a federal offense existed. The record presents less justifiable arguments than those proposed (unsuccessfully) by the government in Walter, supra. This case is one in which certiorari should be granted and the judgment summarily reversed under Walter, supra.

## CONCLUSION

The writ should be granted.

Respectfully submitted,

JERROLD M. LADAR

JERROLD M. LADAR
Counsel for Petitioner

July 10, 1981

APPENDIX

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION THREE

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

vs.

ANTHONY PAUL RUSSO, 1 Crim. 21178

Defendant and Appellant. (Sup. Ct. No. 7841905)

/

Appellant Anthony Russo was convicted on his plea of nolo contendere to a violation of Health and Safety Code section 11379 (importing a controlled substance, MDA). Appellant challenges the propriety of the court's ruling denying his motion to suppress certain evidence.

On June 28, 1978, James Wilburn, a loss prevention supervisor for United Parcel Service (UPS) in Atlanta, Georgia, opened a package sent by a "P. Johnson " and destined for Columbus, Ohio. His purpose was to insert a routing slip inside the package. Although the outside label on the package indicated the contents were gloves, Wilburn discovered an envelope which contained a plastic baggie holding a suspicious look-

ing brown powder he thought to be heroin. Wilburn telephoned the Drug Enforcement Administration (DEA) where he spoke with Agent Tyrone von Yarn. After Wilburn described what he had found inside the package, von Yarn told him to hold the package until the DEA could send someone to investigate. Wilburn replaced the envelope and baggie inside the package, resealed it, and placed it inside an evidence locker. The DEA agent did not suggest or imply in anything he said that Wilburn should pursue any further investigation. Wilburn, however, on his own volition instructed all the receiving clerks to call his loss prevention unit if they received any more packages addressed in a similar manner.

On June 30, 1978, "P. Johnson" deposited a second package with UPS. This package also purported to contain gloves, and was addressed to Palo Alto, California. After the second package was taken to Wilburn pursuant to his instructions, Wilburn opened it and discovered another envelope which contained a plastic baggie with brown powder similar to that found inside the Columbus package. Wilburn

called the DEA a second time and spoke with von Yarn. Von Yarn asked Wilburn to hold this second package with the first. Wilburn resealed the second package and placed it in the evidence locker. After von Yarn arrived later that afternoon, Wilburn removed the packages, placed them in front of von Yarn, and removed their contents. Von Yarn then performed a preliminary field test and determined that the substance was heroin. After the envelopes and baggies were replaced inside the packages, von Yarn directed Wilburn to have the Palo Alto package sent to the DEA office in San Francisco.

On July 11, 1978, a controlled delivery of the package was effected at the home of appellant. A short time later, agents of the DEA and the San Jose Drug Task Force, acting under the authority of a search warrant, entered the home and seized the package. Subsequent analysis of the contents of the baggie disclosed that it was methylenedioxy amphetamine, also known as MDA, not heroin as originally suspected. Appellant challenges the search by arguing

that the events in Atlanta constituted illegal police conduct, and that since the affidavit relied upon von Yarn's account of those events, the warrant itself is invalid. We disagree and affirm the judgment.

Our determination in this case is controlled by the holding in People v. McKinnon (1972) 7 Cal.3d 899. Here, as in McKinnon, the examination of the package being shipped through United Parcel Service was being done in the normal course of business. The packages here were opened to ensure that they reached their proper destinations. Wilburn's intrusion into the package was not as a police agent. Such fact was implied in the court's denial of the motion to suppress.

Wilburn was not hired by the police to search for evidence of a crime, nor did he comply with a police request to participate in a search, nor did he search for the benefit of police who stood "silently by." (People v. Sapper (1980) 102 Cal.App.3d 301, 304-305.) Once Wilburn determined that the package appeared to contain contraband, he had the

duty to notify a law enforcement agency. (See McKinnon, 7 Cal.3d at p. 914.) The second package, the one that was ultimately seized pursuant to the search warrant in appellant's residence, was not opened at the behest or suggestion of the drug enforcement agent. Therefore, as in the case of the first package, the search did not constitute state action which would have required a search warrant. The fact that Wilburn resealed both packages and placed them in storage until the drug enforcement officer arrived, at which time the packages were reopened, does not constitute an impermissible search. (People v. Lanthier (1971) 5 Cal.3d 751; McKinnon, at pp. 915-916.) The court did not err in denying appellant's motion to suppress.

Judgment is affirmed.

Scott, Acting P.J.

I concur:

Deal, J.

I dissent.

The majority relies upon People v. McKinnon (1972) 7 Cal.3d 899 for holding that the motion to suppress was properly denied. If McKinnon were still good law, I might be inclined to agree with the majority, but McKinnon has been so undermined by United States v. Chadwick (1977) 433 U.S. 1; Arkansas v. Sanders (1979) 442 U.S. 753; People v. Minijares (1979) 24 Cal.3d 410; and People v. Dalton (1979) 24 Cal.3d 850 as to no longer be authoritative. If there has been doubt about that proposition, it was resolved, in my view, by Walter v. United States and Sanders v. United States (1980) __U.S.__, 100 S.Ct. 2395.

I would hold that the opening of the package by Wilburn in the presence of DEA Agent von Yarn and von Yarn's field test of the contents thereof was a search in violation of the Fourth Amendment to the Constitution.

Feinberg, J.